IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Application of: **Thierry DUVERGER et al.** Group Art Unit: **3747**

U.S. Appl. No.: **10/551,826** Confirmation No.: **3979**

Filed: **June 26, 2007** Examiner: **Keith A. Coleman**

For: **SELF-IGNITING PETROL INTERNAL COMBUSTION ENGINE**

Attorney Docket Number: **PSA0304231**
Customer Number: **38834**

PETITION UNDER 37 C.F.R. 1.181
FOR WITHDRAWAL OR EXPUNGEMENT OF ALLEGED INTERVIEW SUMMARY mailed May 26, 2009
AND
FOR WITHDRAWAL OF OFFICE ACTION mailed May 26, 2009 AND MAILING OF A NEW, NON-FINAL OFFICE ACTION
AND
FOR COMMUNICATION OF COPY OR TRANSCRIPT OF APPLICANT'S REPRESENTATIVE'S TELEPHONE MESSAGES TO EXAMINER on May 1 and 7, 2009

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450 July 24, 2009
Sir:

Applicant petitions the Commissioner under 37 C.F.R. 1.181 (i) for withdrawal or expungement of the alleged "Interview Summary" mailed May 26, 2009 from the file record of this application, (ii) for withdrawal of the Office Action of May 26, 2009 and mailing of a new, non-final Action, and (iii) for communication to Applicant's representative of a copy or transcript of Applicant's representative's telephone messages to the Examiner on May 1 and 7, 2009.

No interview as defined in MPEP 713 took place through Applicant's representative's messages to the Examiner on any of May 1 and 7, 2009. In addition, no admission as prior art as defined in MPEP 2129 was made on any of May 1 and 7, 2009 or at any other time by Applicant's representative.

Applicant's representative wishes to correct the record and clear his name and reputation.

Statement of Facts

On May 1, 2009, Applicant's representative left a message to the Examiner requesting a telephone interview to discuss the erroneous finality of the Office Action of March 12, 2009. The Examiner did not call back.

On May 7, 2009, Applicant's representative left a second message to the Examiner requesting a telephone interview to discuss the finality of the Office Action of March 12, 2009.

This time, the Examiner called back and a telephone discussion with the Examiner took place on May 7, 2009.

During this telephone discussion:

- Applicant's representative indicated that:
    - (1) Applicant's representative thought that the finality was erroneous because claim 13 had been added and the finality deprived the Applicant of a fair opportunity to address the newly cited reference US 2003/0019466 to Walter, and
    - (2) Applicant's representative thought that there may be a translation problem with Walter, similar to the translation error in the previously cited reference US 5,960,627 to Krampe, which made the finality a critical difficulty for Applicant;
- The Examiner refused to reconsider the finality.

After this telephone discussion ended, Applicant's representative reviewed the original French application to Walter and the English translation in paragraphs 25 and 64 of the document and determined that the English translation was apparently faithful.

Applicant's representative then called the Examiner back on May 7, 2009 and left him a

third telephone message (second message of May 7, 2009) indicating that Applicant's representative had reviewed the original French application to Walter and the English version and he thought that **the English translation of paragraphs 25 and 64 of Walter was not incorrect (which clearly referred to the faithfulness of the translation, not to the truth of the statements in paragraphs 25 and 64 of Walter, especially in the context of the previous telephone discussion)**. Applicant's representative also apologized for any suggestion that paragraphs 25 and 64 were an incorrect translation that he may have given to the Examiner during the telephone conversation earlier in the day. The Examiner did not call back.

On May 12, 2009, Applicant's representative filed a petition to withdraw finality.

On May 15, 2009, the petition was granted.

On May 26, 2009, the Examiner mailed a non-final rejection and the alleged Interview Summary which are the subject of this petition.

Purported Admission in Alleged "Interview Summary" is Denied

As a preliminary, Applicant's representative forcefully denies that he made any admission as purported in the alleged "Substance of the Interview" portion of the alleged Interview Summary mailed May 26, 200, on May 1, 2009, May 7, 2009, or any other time. It is submitted that indicating that a translation of two paragraphs of a reference appears correct with respect to a foreign language original is clearly not an admission as to the truth of what is disclosed in these paragraphs, let alone in the reference as a whole, and let alone as to its status as prior art. See MPEP 2129 ("statement by an applicant… during prosecution identifying the work of another as 'prior art' is an admission"). Here, no admission was made.

Withdrawal or Expungement of Alleged Interview Summary is Appropriate

It is submitted that (1) Applicant's representative's telephone message to the Examiner on May 1, 2009 was not an interview, (2) Applicant's representative's first telephone message of May 7, 2009 was also not an interview, and (3) notwithstanding the Examiner's erroneous interpretation of Applicant's representative's second telephone message of May 7, 2009, this message was not an interview either.

MPEP 713 states: "The personal appearance of an applicant, attorney, or agent before the examiner or a telephone conversation or video conference or electronic mail between such parties presenting matters for the examiner's consideration is considered an interview."

Here, Applicant's representative did not "personally appear" before the Examiner on May 1, 2009, nor on May 7, 2009.

Applicant's representative did not have any "telephone conversation" with the Examiner on May 1, 2009.

Applicant's representative had one telephone conversation with the Examiner on May 7, 2009 but Applicant's representative determined that this discussion had not been an interview, and the Examiner appears to have made the same determination since the alleged "Interview Summary" mailed May 26, 2009 does not purport to record or even mention this telephone conversation.

Applicant's representative did not have any video conference or electronic mail exchange with the Examiner on May 1, 2009.

Even if, arguendo, the term "telephone conversation" were to be interpreted broadly as

including an exchange of views through telephone messages (which is denied, as this mode of conducting interviews is not provided for in MPEP 713), Applicant's representative's second message of May 7, 2009 would not be within the scope of a "telephone conversation" because (i) there was no agreement or understanding to have a "conversation" with the Examiner through telephone messages, and especially not the second message of May 7, 2009 – on the contrary, at the end of the previous telephone discussion on May 7, 2009, the Examiner had completely excluded reconsidering the finality –, and (ii) the Examiner clearly did not consider the second telephone message of May 7, 2009 as a portion or continuation of an on-going alleged "interview" in relation to the telephone discussion of May 7, 2009, since (a) he did not consider the telephone discussion of May 7, 2009 as an "interview" by not recording it or even mentioning it on the alleged "Interview Summary" mailed May 26, 2009 or any other Office paper, and (b) in any case, he unequivocally terminated the telephone discussion of May 7, 2009 by completely excluding any continuation of the discussion.

In summary, Applicant's representative's telephone message to the Examiner on May 1, 2009 was not an interview, and none of the messages on May 7, 2009 were interviews.

Withdrawal of Office Action Mailed May 26, 2009 and Mailing of new, non-final Office Action is Appropriate

It is submitted that the Office Action mailed May 26, 2009 does not comply with the requirements that "the examiner must cite the best references at his or her command" (37 C.F.R. 1.104(c)(2)). Here, the Examiner used a facially deficient and erroneous purported "admission" as a basis for the rejection, i.e., the Examiner did not cite the "best references at this or her

command." See also 37 C.F.R. 1.104(c)(3) ("the examiner may rely upon admissions by the applicant"). Here, no admission was made by any of the Applicant and Applicant's representative.

As stated in MPEP 706: "The goal of examination is to clearly articulate any rejection early in the prosecution process so that the applicant has the opportunity to provide evidence of patentability and otherwise reply completely at the earliest opportunity. The examiner then reviews all the evidence, including arguments and evidence responsive to any rejection, before issuing the next Office action" (emphasis added).

Here, the Examiner purports to record an alleged "interview" that never took place and an alleged "admission" that never was made.

Therefore, it is submitted that the Examiner's action in the Office Action mailed May 26, 2009 is "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2)(A).

Conclusion

In view of the above, Applicant's representative submits that withdrawal or expungement of the alleged Interview Summary mailed May 26, 2009 from the file record of this application is appropriate in this case. The alleged Interview Summary is erroneous, not only as to the purported date and substance of any alleged "interview," and as to any alleged "admission as prior art" as defined in MPEP, but it is also erroneous as to the purported existence of any alleged "interview" as defined in MPEP.

Also, it is requested that the Office Action mailed May 26, 2009, which is based on an inexistent "interview" and inexistent "admission," be withdrawn and a new, non-final Office

Action be mailed, so that the Examiner may set forth any rejections using "the best references at his or her command" and give the Applicant a fair and full opportunity to respond.

More generally, Applicant's representative submits that the Examiner is not comporting with an appropriate standard of fairness with respect to Applicant's representative, and in particular to the standard of fairness with respect to interviews as stated in MPEP 713.01 ("the examiner should attempt to identify issues and resolve differences during the interview as much as possible").

Here, the Examiner refused to address Applicant's representative's legitimate inquiry regarding the incorrect finality of the Office Action, but then he attempted to record an inexistent "interview" and an inexistent "admission" by Applicant' representative. This abusive exploitation of informal communications between Applicant's representative and the Examiner is particularly distressing because Applicant's representative's calls to the Examiner on May 1 and 7, 2009 were intended precisely to **identify the issue** of the erroneous finality of the Office Action of March 12, 2009 and **resolve the difference** in a simple and quick manner, so as to save time and resources for all parties (the USPTO, the Applicant, and Applicant's representative). Furthermore, the second message of May 7, 2009 was intended to correct a possibly misleading explanation in the previous telephone discussion, also in the spirit of clarifying issues so that examination may be conducted fairly and expeditiously.

The failure of these informal communications on May 1 and 7, 2009 resulted in the formal petition process to which Applicant's representative ultimately resorted to have the finality of the Office Action of March 12, 2009 withdrawn.

In this context, Applicant's representative wishes to clear fully his name and reputation, and therefore, communication to Applicant's representative of a copy or transcript of Applicant's representative's telephone messages to the Examiner on May 1 and 7, 2009 is also respectfully requested.

If any fees are due in connection with this paper, please charge our Deposit Account No. 502759.

Respectfully submitted,

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